In The

Supreme Court of the United States

No. 418 October Term, 1958

LUCIAN J. CILETTI, GEORGE H. KRAUSE, ALLAN SCHULTZ, in Their Own Behalf and in Behalf of Other Citizens of the City of Washington and Borough of East Washington,

Appellants

v

THE CITY OF WASHINGTON, BOROUGH OF EAST WASHINGTON, WASHINGTON-EAST WASHINGTON JOINT AUTHORITY, THE CITIZENS WATER COMPANY OF WASHINGTON, PENNSYLVANIA, and MELLON NATIONAL BANK AND TRUST COMPANY, Trustee, Defendants, and PEOPLES BANK OF UNITY, JAMES M. LAMBIE and RUSSELL M. WYLIE, Intervening Defendants,

Appellees

On Appeal from the Supreme Court of Pennsylvania

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS

ANTHONY L. MARINO,
Counsel,
1011 North Front Street
Harrisburg, Pennsylvania,

EUGENE C. SLOAN,
Counsel,
Gallatin National Bank Bldg.
Brownsville, Pennsylvania

WILBUR F. GALBRAITH,
Counsel
Law and Finance Building
Pittsburgh, Pennsylvania,

MILES WARNER,
Counsel,
Room 520,
3 Penn Center Plaza
Philadelphia 2, Pa

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.

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APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS

Appellants respectfully submit the following reply to appellees' motion to dismiss served on appellants on October 30, 1958.

I. THE APPEAL IS WITHIN THE JURISDICTION OF THIS COURT

Appellees concede (Appellees' Brief, p. 3) the specific constitutional repugnancies set forth by Appellants in the Amended Complaint (Appendix C, 40a), but contend that there was no decision in favor of the validity of the controversial statutes involved under the Federal Constitution: that "Nowhere in their brief filed with that Court did the Appellants specifically argue that federal questions were involved (Appendix B). In fact, not one federal court decision was cited in Appellants' brief (See Table of Citations, Appendix B, pp. iii-v)."

In every single brief filed by the Appellants with the courts below, including the two briefs filed by them with the Supreme Court of Pennsylvania in the two appeals taken in this case, the Appellants cited and argued, inter alia, the case of *William H. Carson v. Sewer Commission of Brockton*, 175 Mass. 242, 56 N.E. 1, 182 U.S. 398 (See Appendix B, page iv, and page 19 et seq.). Further, in Appellants' Petition for Rearguument addressed to the Su-

preme Court of Pennsylvania, the first specification of error recited (See Appendix A, p. 39):

> "1. The opinion does not consider the controlling decision of the United States Supreme Court in William H. Carson v. Sewer Commission of Brockton, 182 U.S. 393 (Record, 42a; Brief, 20)."

As to said Petition for Reargument, the Supreme Court of Pennsylvania entered its order: "April 17, 1958, Petition denied. Per Curiam." Invariably cited and argued to the Supreme Court of Pennsylvania, and to the lower court, was also the case of *Hamilton's Appeal*, 340 Pa. 17, stating, at page 22:

> "If the language of the Act can properly be construed as authorizing the imposition of charges except in proportion to the extent of the user, and, a fortiori, if it can be construed as authorizing the imposition of charges irrespective of any use, it is doubtful whether there is a sufficient expression of legislative intent to confine the charge within constitutional limits. See Carson v. Sewerage Comrs. of Brockton, 175 Mass. 242, 56 N.E. 1, aff'd 182 U.S. 398." The constitution here concerned is the federal constitution.

The lower court recognized (Appendix C, 351a):

> "It is contended that said Act conflicts with various sections of the Pennsylvania Constitution, and with certain provisions of the Federal Constitution." (See also Appendix C, p. 509a),

and in reply to said contentions the lower court affirmed the chancellor's findings and conclusions (See Jurisdic-

tional Statement, p. 14), and its decree based thereon was affirmed by the Supreme Court of Pennsylvania.

The last mentioned affirmance by the Supreme Court of Pennsylvania was an affirmative action sustaining the constitutional validity of the contracts, ordinances and statutes in controversy, thereby bringing this case within the purview of appeals allowed to this Court under the provisions cited in Appellants' Jurisdictional Statement, page 2.

A refusal by a state court to consider a federal question which, if considered, would have been controlling, is equivalent to a decision against the federal right involved therein: *Des Moines Navigation and Railroad Co. v. Iowa Homestead Co.*, 123 U.S. 552, 31 L. Ed. 202 (1887).

II. THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Appellants' Petition for Reargument addressed to the Supreme Court of Pennsylvania (See Jurisdictional Statement, p. 39, and "Plaintiff's Memorandum Re Laches", p. 51, which was a part of said Petition, but had also been submitted previously to the court below pending proceedings in the lower court) was adequate, even if artless in some respects, to apprise the court and all interested parties of the specific federal questions involved and in controversy and requiring adjudication.

The substantiality of the questions will appear further throughout the remainder of this paper.

III. THE FEDERAL QUESTIONS AS TO WHICH REVIEW IS SOUGHT BY THE INSTANT APPEAL WERE RAISED TIMELY AND PROPERLY

The last, and most serious, federal question proposed by appellants was the inadequacy of resting the dismissal of the numerous contentions, the many serious and important questions raised, on the revival of a laches plea many times discarded. The alleged wrongs, as to which laches might conceivably apply, were not all of one kind. One group included alleged instances of factual fraud, the determination of which might largely be affected by the credibility of witnesses heard and observed by the chancellor. Another, and more important group, would include contracts made and executed, and ordinances and statutes enforced up to the time plaintiffs' suit was filed. The provisions of such statutes and ordinances present pure questions of law for the courts to construe and apply. The right to complain of wrongs in this category may, in some instances, be barred by laches. A third group, and in the instant case the most important group, relates to the *continuing and prospective* enforcement of statutes and ordinances *after* suit filed declaring their repugnancy to both the state and federal constitutions. The citizen's immunity to deprivation of such a fundamental right by any plea of "laches" stands forth signally recognized in the case of *Wilson v. School District of Philadelphia*, 328 Pa. 225, 195 A. 90, quoted extensively in the Jurisdictional Statement, page 23, et seq. and cited to the Pennsylvania Supreme Court in the Petition for Reargument.

Argument

In the instant case, the peremptory dismissal of all of the people's rights and the complete denial of any relief whatsoever on the ground of laches, and their continued subjection to insufferable wrongs under the contracts, ordinances and statutes, cannot be reconciled with reasonableness, especially where it clearly appears in the record:

1. That the lower court had repeatedly discarded the plea of laches;

2. That the lower court refused to find many incontrovertible relevant and basic facts appearing in the record;

3. That the lower court affirmed many findings and conclusions contra evidence offered by the defendants themselves;

4. That the opinion and decree of the Pennsylvania Supreme Court violate the federal guarantees invoked and recognized in the case of *William H. Carson v. Sewer Commission of Brockton*, 182 U.S. 398, discussed supra;

5. That the opinion and decree violate the fundamental right of the citizen, despite laches, to invoke the protection of the federal constitution against the prospective enforcement of unconstitutional statutes and ordinances, as recognized by the Supreme Court of Pennsylvania in the case of *Wilson v. School District of Philadelphia*, discussed supra;

6. That the opinion and decree of the Pennsylvania Supreme Court violate the fundamental federal rights of the citizen as invoked and recognized by the Supreme Court of Pennsylvania in the case of *Gericke v. City of Philadelphia* (See Appendix B, p. 14, et seq.)

7. That the Pennsylvania Supreme Court opinion recognizes the validity of, but the decree violates the effect of the holding of the Supreme Court of Pennsylvania in the case of *Mitchell v. Chester Housing Authority*, discussed in the Jurisdictional Statement, page 22.

Appellees' objection (Brief, p. 6) that the Pennsylvania Supreme Court did not "expressly" pass on any federal questions is answered in the case of *Des Moines Navigation and Railroad Co.*, supra, and in the Jurisdictional Statement, pp. 36, 37.

Appellees' citations are inapt Typical, are these:

Congress of Industrial Organizations v. McAdory, 325 U.S. 472, was a case of no present urgency. The respondent had agreed not to enforce the Act complained of, and plaintiff was seeking a "declaratory judgment". In the case of *Beaty v. Richardson*, 276 U.S. 599, the appeal was dismissed for the reason that the federal questions sought to be presented were *by the record* abandoned in the State Supreme Court. In this connection, it may be mentioned that Appellants' contention in the case at bar that the Pennsylvania Supreme Court acted arbitrarily and capriciously could not be urged until after the matter complained of had transpired.

Presentation to the state courts of the federal questions involved in the instant case is adequately exampled in the cases already cited by Appellants, supra, and in the Jurisdictional Statement.

IV. THE JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA CANNOT REST ON ANY ADEQUATE NON-FEDERAL BASIS

It is of course true as stated in Appellants' brief, page 8, that "This Court has held many times that where a state court bases its judgment on laches and the decision is made in good faith, its judgment is adequate and so defeats review by this Court." But in every case the judgment was in accord with the merits, and in no case cited was questionable laches permitted to preclude an attack on the *prospective* enforcement of an unconstitutional statute. Indeed, it is at least doubtful whether the Supreme Court of Pennsylvania would be willing to say even now, forthrightly, that laches bars the right to restrain the continuing prospective enforcement of unconstitutional and unconscionable statutes and ordinances. Nor is the "Neizer" case, cited by Appellees, a case controlling the case at bar. The contrast is fundamental, and is set forth in Appendix B, pp. 53, 54, wherein it is plain that in the Neizer case no one urged, nor can it be assumed that there existed, most of the fundamental objections pleaded and proved by the Appellants in the instant case.

It is the gist of Appellants' position in this Court that the refusal of the highest court of Pennsylvania to dispose of this litigation on its merits was a denial to the plaintiffs of judicial remedies which should be available to all citizens of Pennsylvania. Whether or not this denial was of itself an invasion of Appellants' rights to procedural and substantive due process, it is clear that Appellees may not urge that denial as a procedural bar in this court un-

der the pretext that Appellants failed to exhaust their state remedies.

It was urged upon the courts below, truthfully, that the insufferable wrongs perpetrated on the people in the name and under the provisions of the statutes and ordinances herein complained of could not be permitted to continue unabated without serious impairment of the public respect for and confidence in one of its most cherished institutions.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Appellants' Jurisdictional Statement, it is respectfully submitted that the federal questions presented are sufficiently substantial and urgent as to justify plenary consideration, and to permit the filing of briefs on the merits and oral argument for their resolution.

Respectfully submitted,
ANTHONY L. MARINO,
EUGENE C. SLOAN,
WILBUR F. GALBRAITH,
MILES WARNER,
Counsel for Appellants.

Dated November 17, 1958